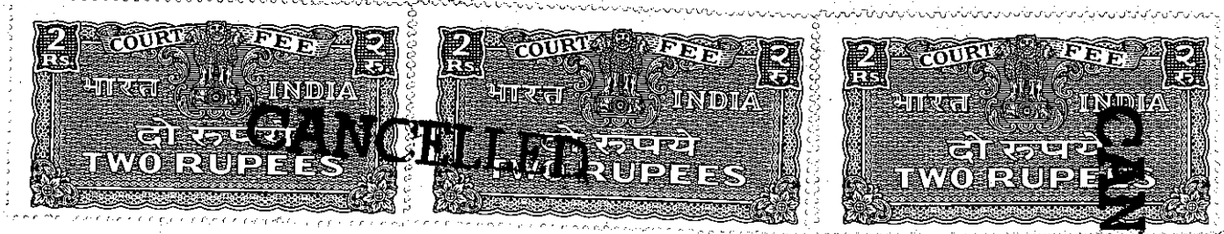

IN THE HIGH COURT OF JUDICATURE AT BILASPUR(C.G.)

SECOND APPEAL NO. 739 **/2003**

Single Bench

APPELLANT
DEFENDANT

Thakurdas Soni,
Aged about 65 years,
S/o. Chhaganlal Soni,
Occupation – Business,
"Sheela Jewellers",
R/o. Edward Road,
Sadar Bazar, Raipur,
Tahsil & Dist. Raipur (C.G.)

VERSUS

RESPONDENTS
PLAINTIFFS

1. Sadashiv Ram Devkar,
Aged about 50 years,
S/o. Shri Gyanu Devkar.
Occupation – Business,
Edward Road,
Sadar Bazar, Raipur,
Tahsil & Dist. Raipur (C.G.)

2. Rajaram Devkar,
Aged about 46 years,
S/o. Shri Gyanu Devkar,
Occupation – Business,
Edward Road,
Sadar Bazar, Raipur,
Tahsil & Dist. Raipur (C.G.)

APPEAL/PLAINT VALUED AT **RS.** 33957

COURT FEE AFFIXED **RS.** 3750

SECOND APPEAL UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE

A.F.R.

31

HIGH COURT OF JUDICATURE AT BILASPUR (C.G)

SECOND APPEAL NO. 739/2003

APPELLANT: Thakurdas Soni.

Versus

RESPONDENTS: Sadashiv Ram Devkar & another

POST FOR ORDER ON 17.03.2004

Sd/-
L.C.BHADOO
Judge

17.03.2004

(32)

HIGH COURT OF JUDICATURE AT BILASPUR (C.G)

SECOND APPEAL NO. 739/2003

APPELLANT: Thakurdas Soni.

Versus

RESPONDENTS: Sadashiv Ram Devkar & another

Present: -

Shri Manindra Shrivastava, Advocate: For the appellant

Shri B.P. Sharma, Advocate: For the respondents

Before: Hon'ble Shri Justice L.C. Bhadoo

J U D G M E N T

(Passed on 17th March, 2004)

1. The defendant/appellant has preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908 being aggrieved by the judgment and decree dated 06.11.2003 passed by the learned VIIIth Additional District Judge (Fast Track Court), Raipur in Civil Appeal No.1A/2003 arising out of judgment and decree dated 22.08.1997 passed by the Civil Judge Class-I, Raipur in Civil Suit No.367A/2002 whereby the learned Civil Judge Class-I decreed the suit of the respondents/plaintiffs against the appellant/defendant for eviction of the suit premises.

2. The brief facts relevant for the disposal of this second appeal are that the plaintiffs/respondents herein filed a suit in the Court of Civil Judge Class-I, Raipur against the defendant/appellant herein for eviction of the disputed premises described as 'GHIJG' in paragraph 4 of the plaint on the ground that in the suit premises the defendant is carrying on the business of gold and silver jewellery and he is tenant in that shop on a monthly rent of Rs.55/-(Rupees Fifty Five) per month. He took that shop on rent from the previous landlords namely Sadhuram Agrawal and Rakesh Agrawal from whom the plaintiffs/respondents had

(33)

purchased the suit premises along with other properties vide sale deeds dated 22.04.1992 and 23.04.1992 and about the said fact previous landlords as well as the plaintiff informed the defendant. They further averred that the tenant-defendant neither paid the rent nor tendered the rent, therefore, he is defaulter and liable to be evicted from the suit premises. They also sought eviction on the ground that the sons of both the plaintiffs are in need of disputed premises for running the shop of gold and silver jewellery as well as for refinery of jewellery, as they are unemployed and there is no other alternative non-residential accommodation is available to them for running the said business. The defendant/appellant has filed written statement and denied the need of the plaintiffs.

3. The learned trial Court after framing issues and after recording evidence of the plaintiffs and defendant decreed the suit of the plaintiffs. Being aggrieved by the judgment and decree of the Civil Judge Class-I, the appellant herein preferred a regular appeal before the Additional District Judge, which was dismissed by the impugned judgment and decree.

4. I have heard the learned counsel for the parties on the question of admission.

5. As per provisions of Section 100 of the Code of Civil Procedure, 1908 this Court is entitled to entertain an appeal only on the ground of substantial question of law because Section 100 of Code of Civil Procedure says that "save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law". Therefore, on other ground second appeal is maintainable.

6. Now coming to the question whether the appellant has been able to raise a substantial question of law. In the matter of **Kashi Bai and another Vs. Parwati Bai and others reported in 1995 (6) SCC Page 213** the Hon'ble Apex Court held that "it may not be out

(34)

of place to mention that sub-section (1) of Section 100 of the Code of Civil Procedure explicitly provides that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Sub-section (4) of Section 100 provides that when the High Court is satisfied that a substantial question of law is involved in any case it shall formulate that question. It has been the consistent view of this Court that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, based on appreciation of the relevant evidence". In the matter of **Durga Choudhrain Vs. Jawahir Singh Choudri (17 IA 122 (PC)**, the Privy Council held that "there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be". Again in the matter of **Dnyanoba Bhaurao Shemade V. Maroti Bhauraon Marnor reported in 1999 (2) SCC 471** the Hon'ble Apex Court held that "the question whether a finding of fact is against the weight of evidence does not project a question of law, much less a substantial question of law". The Constitution Bench of the Supreme Court in the case of **Chunnilal V. Mehta and Sons Ltd Vs. Century Spg. And Manufacturing Co. Ltd. reported in 1962 Supp (3) SCR 549** held as under;

> " The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law"

7. Therefore, in view of the above law the High Court should test the presence of substantial question of law before admitting the second appeal and Section 100 of Code of Civil Procedure does not provide an absolute and automatic right to appeal. It is also settled

35

law that if the judgment and decree impugned is passed on no evidence or totally in disregard to the evidence on record then that fact is also a substantial question of law as to whether the decree passed by the Appellate Court is based on no evidence or totally in disregard of the evidence available on the record. The Hon'ble Apex Court in the matter of **State of Rajasthan v. Harphool Singh reported in 2000(5) SCC Page 652** held that "where there are glaring inconsistencies and contradictions in the evidence and issues raised are serious in nature (destruction of title of State to suit properties in this case), held, High Court is not hampered by the provisions of Section 100 from interfering with even concurrent findings of fact of the lower courts and where the findings based on surmises and conjuncture, perverse findings not based on legally acceptable evidence and which are patently contrary to law declared by Supreme Court and cannot have any impunity from interference in the hands of the appellate authority".

8. Therefore, in view of the above law laid down by the Hon'ble Apex Court, if we examine the present appeal the learned counsel for the appellant tried to raise a question as substantial question of law that whether the learned Court below was justified in rejecting the appeal of the appellant/defendant while completely ignoring the fact that the respondents/plaintiffs have neither pleaded nor proved the bonafide requirement of the suit accommodation whereas the same has come in the evidence that the respondents/plaintiffs have stated that they are having two non-residential accommodations, in which they are running their jewellery shops. Learned counsel for the appellant argued that while passing the decree the trial Court and the Appellate Court have not considered the requirement of sub-clause (f) of sub-section 1 of Section 12 of M.P. Accommodation Control Act, 1961 in which it has been clearly prescribed that "the landlord or such other person has no other reasonably non-residential accommodation of his own or in his occupation in the city or town concerned". In the fist instance this Court is not entitle to entertain the second appeal against the concurrent findings of both the Courts on the issue of necessity of disputed premises for the sons of the plaintiffs. Even otherwise, if we look into the

(96)

plaint, evidence and judgment of the trial Court as well as the Appellate Court, the argument of the learned counsel for the appellant is without any force and totally misconceived. The plaintiffs have specifically mentioned in Paragraphs 7, 8A, 8B & 8C of the plaint that the suit property in question is bonafidely required by Plaintiff No.1 for starting business of gold & silver ornaments for his sons namely Ganesh & Anil and the plaintiff No.1 is not in occupation of any other suitable non-residential accommodation of his own where he can start the business of his sons. Similarly in Paragraph 8-B it has been mentioned that Plaintiff No.2 is in bonafide need for starting gold and silver refinery business for his son namely Sunil Kumar, who is unemployed and Plaintiff No.2 is not in occupation or has no other alternative non-residential accommodation of his own where the plaintiff No.2 can start business for his son. In Paragraph 8-C it has been mentioned that at present the plaintiffs are carrying on the business in a partnership firm in the name and style of Devkar Jewellers in the shop situate at Edward Road, Raipur near the shop owned by the Hindu Undivided Family of the plaintiffs and their brothers and the sons of the plaintiffs are unemployed. Therefore, the plaintiffs' case is very specific that they are dealing in the business of gold and silver jewellery in the name and style of Devkar Jewellers in a shop situate at Edward Road, Raipur and the same is a joint family business. In the evidence of PW-1 Rajaram Devkar and PW-2 Sadashiv Devkar it has categorically come that Devkar Jewellers is an undivided joint Hindu family property in which the plaintiffs along with their third brother are partners and they are running the business whereas the disputed premises is required for starting business of their sons who are unemployed and presently their sons are learning that business in their joint family business. They have further stated that the disputed premises are required for the business of their sons Ganesh, Anil & Sushil.

9. So far as the question of availability of alternative non-residential accommodation is concerned which the learned counsel for the appellant tried to raise has already been considered by both the

(37)

Courts that these witnesses have specifically stated that they have no other alternative non-residential accommodation to start the business of their sons. PW-1 Rajaram Devkar in Paragraph 8 of his evidence clearly stated that there is no other non-residential accommodation available and further stated that presently his sons and his brother's son are helping in their joint Hindu family business i.e. Devkar Jewellers. In the cross-examination he stated that they are running the said shop i.e. Devkar Jewellers in their house which is three stories building, which is being used for their residential purpose also. Same is the evidence of PW-2. In paragraphs 8 & 9 of evidence PW-2 has stated that there is no other alternative non-residential accommodation is available to them for starting business of their sons and presently their sons are assisting them in their joint Hindu family business. The defendant in Paragraph-8 of his evidence stated that he has not confirmed from any office or from anybody else that the sons of the plaintiffs are doing the business. He is saying on his own guesswork that sons of plaintiffs are doing their business.

10. When the plaintiffs have specifically stated that no alternative non-residential accommodation is available to them then the defendant had opportunity to elicit from them in the cross-examination and suggesting the fact that particular building is available with them for carrying out the business of their sons and the same is in their occupation. Simply giving general evidence that the plaintiffs have alternative non-residential accommodation to carry out the business of their sons cannot be acted upon and believed to throw the case of the plaintiffs. Both the Courts have considered this aspect in the judgment.

11. Therefore, in view of the above, learned counsel for the appellant has not been able to raise a substantial question of law that the plaintiffs have not been able to prove and establish that they have no alternative non-residential accommodation to start the business of their sons.

12. Learned counsel for the appellant tried to raise a question by way of substantial question of law that whether the learned Appellate

BB

Court was justified in rejecting the appeal inspite of the fact that there is discrepancy amongst the respondents/plaintiffs with regard to the ownership of two existing non-residential accommodation i.e. Devkar Jewellers & Devta Jewellers. In the first place this point was neither raised before the trial Court nor before the Appellate Court, therefore, the defendant/appellant is not entitled to raise this point for the first time in the second appeal. Even otherwise, the argument of the learned counsel for the appellant is totally misconceived. There is no discrepancy in the evidence of the plaintiffs regarding the ownership of two existing residential accommodations. PW-1 Rajaram Devakar in his evidence stated that there is joint Hindu undivided family business of gold and silver ornaments in the name and style of Devkar Jewellers whereas PW-2 Sadashiv Devkar has stated that the business of joint Hindu family is in the name and style of Devta Jewellers. It appears that while giving evidence PW-2 has inadvertently mentioned the name of joint Hindu family business as 'Devta Jewellers' instead of 'Devkar Jewellers' and if the appellant/defendant was at all concerned about this then the counsel for the appellant/defendant ought to have elicit in the cross-examination that Devkar Jewellers and Devta Jewellers are different firms and they have sufficient non-residential building for carrying out the business of their sons, which has not been done. The question for consideration of trial Court and Appellate Court was that whether any alternative non-residential accommodation to carry out the business of sons of the plaintiffs is available and that the plaintiffs have been clearly able to establish that there is no other alternative non-residential accommodation to start the business of their sons and the defendant has not been able to come forward to establish that particular non-residential building is in possession of the plaintiffs for carrying out the business of their sons. Therefore, on this ground also the defendant has not been able to raise a substantial question of law.

13. The learned counsel for the appellant also argued that one of the part of the disputed shop was purchased by respondent No.1 and other part of the shop was purchased by respondent No.2, therefore, they ought to have sought eviction separately in their

(39)

own right proving the necessity for their sons and they have filed wrong suit jointly for the eviction of the shop.

14. In the first instance this point was not raised by the appellant in his written statement and no issue was framed on this point by the trial Court. However, without issue and pleading of the parties the learned First Appellate Court entertained this argument. In my opinion the learned First Appellate Court ought not to have allowed this argument. Even otherwise as per the provisions of Order 1 Rule 1 of the Code of Civil Procedure, 1908 all the persons may be joined in one suit as plaintiffs where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) if such persons brought separate suits, any common question of law or fact would arise.

In this connection the Rule 3 of Order 2 is also relevant which lays down that:

> (1) Save as otherwise provided, a plaintiff may unite in the same several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

15. In view of the above provisions of the Code of Civil Procedure, if we look into the facts of the present case the disputed premises was taken by the defendant from the previous landlord on rent, as a one unit. However, the respondents purchased the disputed shop as well as other land from the previous landlord and each of the respondents have purchased ½ part of the shop alongwith other land from the previous landlord and the respondents have filed the suit for eviction of the shop for reasonable and bonafide necessity of their sons for setting up of the gold and silver jewellery business. As per the above provisions of law of the Code of Civil Procedure, the several plaintiffs jointly deriving titles in respect of an entire property from different sources, may bring one suit against the defendants for its recovery even where the property is

purchased by different persons in different portions under separate deeds, suit by all of them for eviction of the tenant of the whole property is maintainable as the suit conforms to the requirement of Order 1 Rule 1 which also applies to the question of joinder of parties as also to cause of action and in this connection I am fortified in my view by the judgment of Rajasthan High Court held in **Harriram V. Kanhaiya, A 1975 Raj 23**. When there is no conflict of interest as between the plaintiffs, the cause of action in respect of both the tenanted premises is common namely the bonafide requirements of the plaintiffs and so the suit will not fail on the ground of multifariousness. Therefore, in view of the above, the argument raised by the learned counsel for the appellant is not a substantial question of law.

16. No other points were argued or pressed by the learned counsel for the appellant.

17. In view of the above discussion the defendant / appellant has not been able to raise a substantial question of law before this Court. Therefore, as no substantial question of law is available in this second appeal the same is liable to be dismissed on this ground and accordingly, it is dismissed at the admission stage itself.

Sd/-
L.C.BHADOO
Judge

/5th/03/2004